

EEOICPA BULLETIN NO.02-05

Issue Date: April 1, 2002

Effective Date: December 28, 2001

Expiration Date: April 1, 2003

Subject: Effect of tort suits against beryllium vendors and atomic weapons employers on eligibility for compensation under EEOICPA

Background: Section 7385(d) of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), per December 28, 2001 amendments to the National Defense Authorization Act for 2002, determines the effect of tort suits filed against a beryllium vendor or atomic weapons employer on the rights of otherwise eligible individuals to receive compensation under the EEOICPA.

Reference: 42 U.S.C. 7385(d)

Purpose: To notify the District Offices of the effect of tort suits against beryllium vendors and atomic weapons employers on eligibility for compensation.

Applicability: All staff.__

Actions:

1. If an otherwise eligible individual filed such a tort suit before October 30, 2000, and the suit remained pending as of the date of enactment of the National Defense Authorization Act for 2002 (December 28, 2001), then the individual is not eligible for compensation under EEOICPA unless he or she dismisses the tort action before December 31, 2003.

2. If an otherwise eligible individual filed a tort suit against a beryllium vendor or atomic weapons employer between October 30, 2000, and December 28, 2001, that individual is not eligible for compensation under EEOICPA unless he or she dismisses the tort action before the later of April 30, 2003, and the date that is 30 months after the

date that he or she becomes aware that the covered employee may have a covered illness connected to exposure in the performance of duty under section 3623.

3. If an otherwise eligible individual files such a tort suit after December 28, 2001, and a final court decision is entered against the individual, he or she will not be eligible for compensation under EEOICPA.

4. If no final decision is entered in a tort suit filed after December 28, 2001, then the otherwise eligible individual will not be eligible for compensation unless he or she dismisses the tort suit before the later of April 30, 2003, and the date that is 30 months after the date that he or she becomes aware that the covered employee may have a covered illness connected to exposure in the performance of duty under section 3623.

5. Section 7385(d) of the EEOICPA, as amended, affects only the rights of the individual otherwise eligible for compensation under the Act. Typically, the "otherwise eligible individual," who must take action to avoid forfeiting compensation, will be either a "covered beryllium employee" or a "covered employee with cancer," as those terms are defined in the regulations at 20 C.F.R. §§ 30.205 and 30.210. Such an "otherwise eligible individual" also could be a survivor of a deceased covered employee with no cause of action in his or her own right. In either of those situations, where the only plaintiff is an individual who is otherwise eligible for benefits under EEOICPA, the entire tort suit would have to be dismissed in a timely manner in order to preserve either the covered employee's or the survivor's entitlement to EEOICPA benefits.

6. Tort suits covered by section 7385(d) can also have multiple plaintiffs with separate causes of action, however. For example, a tort suit brought by a living covered employee could include his or her spouse as a plaintiff with the spouse's own cause of action for loss of consortium due to the covered employee's exposure to beryllium or radiation. If such another plaintiff is not an "otherwise eligible individual," he or she need not take any action pursuant to section 7385(d). Thus, if a covered employee is living, his wife is not eligible for compensation under EEOICPA and the continued pendency, or settlement, of a suit in which the wife is advancing her own cause of action would have no effect on the covered

employee's eligibility for compensation. Similarly, in a case where the covered employee is deceased and a spouse is eligible for EEOICPA compensation, other family members, such as children, who may also have brought suit based upon the covered employee's death, would not have to dismiss their causes of action. Only the individual who is "otherwise eligible" for compensation under EEOICPA is required to take action regarding his or her tort suit in order to preserve his or her eligibility. Finally, tort suits that terminate, either by settlement, final decision, or withdrawal, before December 28, 2001, do not effect eligibility for compensation under EEOICPA, but the amounts recovered in such actions may be offset against compensation awarded under the Act.

7. Section 3641 of the EEOICPA provides that the payment of benefits to an individual, or to a survivor of that individual, must be offset by the amount of a payment made pursuant to a final award or settlement on a claim based on injuries incurred by that individual on account of the exposure of an employee covered by the EEOICPA to beryllium, radiation or silica. In a situation that involves multiple plaintiffs where OWCP confirms that the covered employee has timely dismissed his or her cause of action for injuries due to exposure to beryllium or radiation but the covered employee's spouse (the only other plaintiff in this example) has settled or won his or her cause of action for loss of consortium, OWCP will not offset the EEOICPA benefits that are payable to the covered employee by the amount of the settlement paid to the spouse. Section 3641 only applies to awards or settlements paid to or for covered employees for occupational illnesses covered by the EEOICPA. Therefore, because the settlement of the spouse's cause of action for loss of consortium is not paid to or for the covered employee, OWCP will not offset the covered employee's EEOICPA benefits by the amount of the settlement payment to the spouse. Care should be taken, however, to determine that the settlement or award actually represents a recovery only by someone other than the individual "otherwise eligible" for benefits under EEOICPA.

Disposition: Retain until incorporated in the Federal
(EEOICPA) Procedure Manual.

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Occupational Illness Compensation